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# Introduction

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# INTRODUCTION

It is obvious that, as sexual animals, human beings have a capacity and need for erotic love and that this love may take a diversity of forms and objects. Obvious too, that in addition to an esthetics of sexuality, there must also be an ethics and even politics of sexuality. Yet long books on justice, equality, liberty, etc., have been written as if these issues are either irrelevant or too delicate to discuss. One exception to the silence of the canon may be found in liberal jurisprudence. From Jeremy Bentham to Ronald Dworkin, that tradition has sought, especially, to defend the interests of sexual minorities against a variety of attacks.

In part, this engagement of jurisprudence with sexuality resulted from the confluence of two views: that sexuality is an elemental drive, and that law is a repressive force. Recently, however, those views have been challenged or at least qualified by new theories of sexuality. A leading influence here is the work of the French writer Michel Foucault, together with the earlier and indigenous 'labelling theory' in sociology. On this account, our sexualities and the categories through we understand them—for instance, 'lesbian', 'gay', 'bisexual', or 'straight'—are not part of the furniture of the universe but rather are themselves produced by systems of regulation including the law. This attitude, often called 'constructivist', 'anti-essentialist', or even 'post-modernist', is now the controlling voice in theorizing sexuality.

Do such theories matter to jurisprudence? How relevant is knowing the ontological status of categories like 'gay' or 'straight', or for that matter 'man' or 'woman', to our *normative* concerns about justice, equality, or liberty? One might say, not at all. Explaining the injustice of discriminating against lesbian mothers no more requires an ontology and than explaining the injustice of religious persecution requires a theology. Vastly more popular than this is the thought that a constructivist ontology is somehow liberating, that it unmasks the ways in which law not only represses but produces sexuality and thus alerts us to new forms and abuses of power.

Among the present contributors, Richard Mohr puts the most direct and urgent challenge to the new view. So far from having a liberatory potential, the post-modern conception embraces an ethical relativism that has no resources to combat oppression and defend rights to privacy, equality and free expression. An opposing position is taken up by Carl Stychin, who in his analysis of equality rights jurisprudence in Canada detects a kind of immutabilist essentialism. He finds that doctrine both misguided and unattractive, for it precludes a more fundamental critique of heterosexism. He wants the benefits of human rights law but without the risks of categorial thinking.

Two papers probe the overlapping issue of personal choice in arguments about sexuality. Richard Nordahl contends that even one as sympathetic to gay rights as is Ronald Dworkin must fail to clinch the case if he appeals only to respect for choices. In contrast to Stychin, Nordahl insists on the reality of gays as a distinct grouping of people, and on the relevance of empirical evidence about the nature of sexual orientation to our normative judgments. The notion of choice, however,

is a complex one and may figure in a normative argument in a variety of ways. One familiar view holds that we should be free to choose in order to be true to ourselves. Charles Taylor has argued that if this ambition is not to end up being self-defeating, it must look to external horizons of significance beyond the individual in order to ground those choices. From this it supposedly follows that minority sexual orientations deserve respect and recognition only if there is a certain kind of significance to one's 'choice' of orientation. In my paper, I refute this view, and attempt to clarify the proper role of choice in arguments about sexuality, and to defend the modern notion of authenticity.

Allan Hutchinson joins the issue of pornography on the side of the post-moderns. A sad irony of academic life is that Richard Mohr's important book *Gay Ideas* was for a time subject to a customs ban in Canada, a ban invigorated by the anti-pornography views of Catharine MacKinnon as transmitted through certain feminist groups and on to the Supreme Court in its *Butler* decision. While Mohr says that post-moderns have inadequate resources to defend free speech, that is precisely what Hutchinson offers. Stressing the constructedness and contingency of all meanings, Hutchinson seeks to undermine MacKinnon's view as wrongly essentialist and to put in its place a nuanced and context-dependent politics of speech.

In the interstices of the law, there is sometimes room for self-help in defense of one's rights. Andrea Austen and Alex Wellington here assess one sort of self-help in the defense of gay rights. What has come to be known as 'outing' is the practice of exposing gay people who are in hiding. While Mohr has been a powerful advocate of this strategy, Austen and Wellington offer a more cautious assessment, defending it only when necessary in self-defense and pointing out its many hazards.

Our final two discussions take up the issue of rape. Keith Burgess-Jackson gives close scrutiny to the ways in which conceptual disputes about the nature of rape influence opinion about the legitimacy of 'statutory rape laws', laws that make it an offense to have sex with someone under a prescribed age. Depending on whether one takes 'conservative', 'radical', or 'liberal' views about the nature of rape and the grounds for prohibiting it, one will have different attitudes towards the legitimacy of such laws, and to permissible defenses to charges under them. J.H. Bogart puts the question in its most general terms—what *is* rape? He defends a view of rape as nonconsensual sex, an idea broader than the notion of non-voluntary sex. Consent requires more than the mere fact that sex is undertaken voluntarily as the result of a choice; it also requires that sex be chosen on the basis of adequate information, unmanipulated desire, and a recognition of the consequences of the act. This distinction will often make a difference; for example, people may be drunk enough to render their consent invalid without rendering their actions non-voluntary. The specific evils of rape are best understood in light of the violation of the validity conditions of such consent.

The issues raised in this volume—the nature and significance of our notions of sexuality, the intersection of these with our normative concerns—are all of them deep and urgent. These papers aspire to continue a tradition of jurisprudential argument that recognizes their centrality.

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